

# Humane Killing and the Ethics of the Secular: Regulating the Death Penalty, Euthanasia, and Animal Slaughter

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## INTRODUCTION: DEATH AND THE ETHICS OF THE SECULAR

In the short story “Three Deaths,” Tolstoy plots the passing away of three unlikely protagonists—a noblewoman, a coachman, and a tree.<sup>1</sup> Though the deaths unfold within shared coordinates of time and space—Russia in the second half of the nineteenth century<sup>2</sup>—they manifest radically different attunements to

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1. LEO TOLSTOY, *Three Deaths*, in TOLSTOY’S SHORT FICTION: REVISED TRANSLATIONS, BACKGROUNDS AND SOURCES CRITICISM 45 (Michael R. Katz ed., 2d ed. 2008) [hereinafter TOLSTOY, *Three Deaths*]. Tolstoy was preoccupied with death and dying in his work, most famously in LEO TOLSTOY, *THE DEATH OF IVAN ILYICH AND THE DEVIL* (Hugh Aplin trans., Hesperus Press Ltd. 2005) (1887 & 1890) [hereinafter TOLSTOY, *IVAN ILYICH*].

2. TOLSTOY, *Three Deaths*, *supra* note 1, at 45 n.† (first published in 1859).

mortality. The noblewoman, who suffers from consumption, refuses to face the reality of her impending death, clinging to the hope that a trip to Italy will help her regain her fast failing health.<sup>3</sup> The old peasant driver, who lies sick and agonizing on an oven in the carriage drivers' quarters, is well aware of his approaching demise but makes little of his condition and accepts death as a matter of fact.<sup>4</sup> Finally, the tall young tree in the middle of the forest, oblivious of its own finitude, finds its death early one morning when a few powerful chops from the woodcutter bring it crashing down.<sup>5</sup>

Taking as my point of departure the 2008 death-penalty case of *Baze v. Rees*,<sup>6</sup> but then stepping back into the nineteenth century in search for a deeper understanding, the following Article narrates three more deaths of the period, with protagonists just as improbable. Unlike Tolstoy, however, my aim is to explore the ways in which very different modes of dying began to converge in the nineteenth century, under the pressure of cultural sensitivities and legal sensibilities, and today bear a striking resemblance. All three deaths, or more accurately takings of life, are sanctioned by the state and fashioned by law, and all three have stirred significant legal controversy and brought about legal reform. Their protagonists are the death row inmate, the terminally ill patient, and the farm animal. Their killings take the familiar forms of the death penalty, euthanasia, and animal slaughter.

These deaths, which are seemingly unconnected, have given rise to strikingly similar political concerns and legal regulations. What exactly then ties together the death penalty in a Kentucky penitentiary, mercy killing by a Dutch physician, and the deadly blow from a bolt in abattoirs across the country? How has it come about that the ethics and practice of these methods of killing share so much in common, as we shall see, whereas the justifications for the killings themselves share nothing at all? Indeed, they seem as incommensurable as the political alignments they form, which often pit reds, blues, and greens against each other. The riddle I wish to present, and the puzzle I will only begin to resolve, concerns the convergence of these modes of killing and emergence of uniform laws and techniques of our death-polity.

If these practices of taking life nevertheless converge, their meeting ground is on a deeper ethical, cultural, and ontological plane. They mark the simultaneous decline of an older ethics of death and the emergence of a new one. The traditional ways of taking life and different forms of suffering that accompanied them have become intolerable: the merciless execution of the subject by the sovereign at the scaffold, the excruciating pain often accompanying the departure of the soul at the deathbed, and the ruthless dominion of humans over animal life and death. With the advancement of a modern ethics codified into law, new

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3. *Id.* at 47–49.

4. *Id.* at 50–51.

5. *Id.* at 56.

6. *Baze v. Rees*, 553 U.S. 35 (2008) (plurality opinion).

methods of killing have replaced older ones.<sup>7</sup> These three deaths, each of which traditionally had their distinct justifications, belonging to a different realm of reality—namely, the relationships between Man and God, Man and Man, and Man and animal—have undergone a similar transformation which has brought them closer to each other since the late nineteenth century.

Most strikingly, the emerging ethics clearly separates the question of killing from the method of killing. Whereas the former is taken for granted (in the case of animals), is constitutionally permissible (as in the case of the death penalty),<sup>8</sup> or in any event is no longer taken as a legal taboo (as in the case of physician-assisted suicide),<sup>9</sup> the latter is placed under close scrutiny and monitored for any unnecessary imposition of pain and suffering on the helpless body.

An overly hasty critique may seek to expose the ideal of humane killing as a hypocritical oxymoron. How can the law be so carefully attuned to the suffering of death row inmates, while remaining indifferent to their execution? Is the growing support for the legalization of euthanasia no more than a thin veil intended to conceal the cruelty of death from the bystander and perpetrator more than from the dying patient herself? And how can the law tolerate the killing of masses of animals for human consumption, but categorically oppose traditional methods of slaughter as inhumane?

Rejecting the accusation of hypocrisy, but without adopting the self-righteous justifications that dominate the legal canon, the following Article seeks to reexamine the emergence of a new regulation of death and dying and ultimately the advancement of a new ethics, which reaches far beyond the ambit of the deathbed. Indeed, humane killing is no oxymoron, and far from being a logical contradiction, it captures a deep and meaningful logic of modern law and ethics. Building on the work of anthropologist Talal Asad, I will refer to this ethics as “the ethics of the secular.”<sup>10</sup> Ethics here does not signify a given set of norms and beliefs (as in “secular ethics”) but rather the broader cultural or, better, cosmological framework in which such norms are formed. Humane killing offers an opportunity to closely explore the emergence of this new ethics and the specific sense in which its understanding as “secular,” and its relationship to religion and more precisely to the “sacred,” sheds light on this distinct set of practices and sensitivities that dominate the current legal mindset.

At the heart of this new ethics is a particular concern with pain and suffering.

7. See generally David Garland, *Modes of Capital Punishment: The Death Penalty in Historical Perspective*, in AMERICA'S DEATH PENALTY: BETWEEN PAST AND PRESENT 30, 53–54 (David Garland et al. eds., 2011) (comparing medieval and modern modes of employing the death penalty).

8. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976).

9. See The Oregon Death with Dignity Act, OR. REV. STAT. §§ 127.800–995 (West 2003 & Supp. 2014); The Washington Death with Dignity Act, WASH. REV. CODE ANN. §§ 70.245.010–904 (West 2011); *Baxter v. State*, 224 P.3d 1211, 1221 (Mont. 2009) (finding that physicians may employ consent as a defense).

10. See generally TALAL ASAD, FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY 16 (2003).

It will not suffice to take this concern at face value and as a benign application of the Benthamite imperative to minimize pain;<sup>11</sup> rather, what is called for is a close scrutiny of this ethics, which singles out certain forms of suffering while ignoring others.<sup>12</sup> What is interesting in the development of the ethics of the secular is, as Asad writes, “not merely that some forms of suffering were to be taken more seriously than others, but that ‘inhuman’ suffering as opposed to ‘necessary’ or ‘inevitable’ suffering was regarded as being essentially *gratuitous*, and therefore legally punishable.”<sup>13</sup>

The case of humane killing offers an especially apt opportunity to analyze what makes certain forms of suffering rather than others intolerable. While Asad is correct in pointing out that only unnecessary pain becomes intolerable,<sup>14</sup> what precisely makes certain ways of suffering inevitable and others gratuitous remains an open question. This has less to do with medical developments and much more with the rise of a new secular ethics and cosmology that has made the pangs of death “unnecessary.” As we shall see, this secular ethics of death, pain, and dying emerged no later than the second half of the nineteenth century and continues to govern the most recent legal developments.

In the final analysis, the aim of this Article is to understand humane killing by contemplating its fundamentally secular nature, and conversely to deepen our understanding of our secular age through a critical examination of humane killing. The critique questions the way champions of this emerging ethics portray their position as enlightened secular moral progress, without arriving at the opposite conclusion, which reduces secular ethics to the dynamics of power relations and wanton violence.

#### I. *BAZE V. REES*: CONVERGENCE AND CROSS-REFERENCE

In *Baze v. Rees*,<sup>15</sup> the Supreme Court addressed the constitutionality of the lethal injection under the Eighth Amendment.<sup>16</sup> Though the case concerned the legitimacy of lethal injection as a method of punishment, the Court soon found itself discussing other contexts of taking life. At the heart of the case was the three-dose protocol used by the state of Kentucky as well as by thirty-five other states and the federal government.<sup>17</sup> Of the three stages—anesthetizing,

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11. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 2 (Laurence J. LaFleur ed., Hafner Publ'g Co. 1948) (1789).

12. ASAD, *supra* note 10, at 113.

13. *Id.*

14. *Id.*

15. *Baze v. Rees*, 553 U.S. 35, 41 (2008) (plurality opinion).

16. For a discussion of the case and its history in a somewhat different context, see Ty Alper, *Anesthetizing the Public Conscience: Lethal Injection and Animal Euthanasia*, 35 *FORDHAM URB. L.J.* 817, 818–44 (2008); Jeff Welty, *Different Endings: Lethal Injection, Animal Euthanasia, Humane Slaughter, and Unregulated Slaughter*, 3 *GOLDEN GATE U. ENVTL. L.J.* 61, 64–77 (2009).

17. *Baze*, 553 U.S. at 44.

paralyzing, and killing by causing cardiac arrest<sup>18</sup>—the most questionable was the second stage, inducing paralysis.<sup>19</sup> Attorney for the petitioners, two death row inmates, argued that if the first drug, the anesthetic sodium thiopental, is not properly administered then the inability to detect this failure due to paralysis induced by the second drug, pancuronium bromide, could lead to a tormented death.<sup>20</sup> Such a protocol, which might render the convict immobile while still conscious and suffering, is cruel and unusual.<sup>21</sup>

The Court affirmed the constitutionality of the three-stage method by a vote of seven to two, with Justices Ginsburg and Souter dissenting.<sup>22</sup> Upholding the constitutionality of the lethal injection procedure, the Court stated that petitioners had failed to prove that the procedure caused a “substantial risk of serious harm” and that merely proving that it caused an unnecessary risk did not meet this constitutional standard.<sup>23</sup> Furthermore, the majority opinion, written by Chief Justice Roberts, held that it was difficult to regard the protocol as “objectively intolerable” given the large number of states that have adopted the practice as humane.<sup>24</sup>

Though often neglected in the legal literature, one of the powerful arguments, rhetorically if not substantively, was the comparison the petitioners drew between the death penalty and the killing of animals.<sup>25</sup> To drive home their point that the use of the three-dose method is cruel and unusual, petitioners called attention to the fact that a similar method has been outlawed in the putting down of animals.<sup>26</sup> Indeed, laws regulating the euthanasia of pet animals in twenty-three states, including Kentucky, outlaw the use of neuromuscular paralytics, precisely because they may hide the fact that the animal was not properly anesthetized and is suffering.<sup>27</sup> Surely, petitioners argued, drugs that have been deemed inhumane

18. *Id.*

The first drug, sodium thiopental . . . is a fast-acting barbiturate sedative that induces a deep, coma-like unconsciousness . . . . The second drug, pancuronium bromide . . . is a paralytic agent that inhibits all muscular-skeletal movements . . . . Potassium chloride, the third drug, interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest.

*Id.* (internal citations omitted).

19. *See id.* at 71–73 (Stevens, J., concurring).

Use of pancuronium bromide is particularly disturbing because—as the trial court specifically found in this case—it serves “no therapeutic purpose.” The drug’s primary use is to prevent involuntary muscle movements, and its secondary use is to stop respiration. In my view, neither of these purposes is sufficient to justify the risk inherent in the use of the drug.

*Id.* at 73 (Stevens, J., concurring).

20. *Id.* at 49 (plurality opinion).

21. *Id.* at 41.

22. *Id.* at 63.

23. *Id.* at 51.

24. *Id.* at 53.

25. *See id.* at 58.

26. *Id.*

27. Brief of Dr. Kevin Concannon et al. as Amici Curiae in Support of Petitioners, *Baze v. Rees*, 553 U.S. 35 (2008) (No. 07-5439), 2007 WL 3440946, at \*18 & n.5.

and illegal when administered to animals must be considered inhumane if administered to humans.<sup>28</sup> In the words of Justice Stevens, “It is unseemly—to say the least—that Kentucky may well kill petitioners using a drug that it would not permit to be used on their pets.”<sup>29</sup>

Repudiating this line of argument, Chief Justice Roberts and Justice Alito referred to yet another very different context of taking life—the Dutch practice of euthanasia, which uses a similar three-dose protocol.<sup>30</sup> Their ruling emphasized that the Royal Dutch Society for the Advancement of Pharmacy recommends, in fact, the use of the paralytic to bring about euthanasia.<sup>31</sup> Furthermore, the Court added that “other methods approved by veterinarians—such as stunning the animal or severing its spinal cord—make clear that veterinary practice for animals is not an appropriate guide to humane practices for humans.”<sup>32</sup> Finally, the Court concluded that the use of pancuronium bromide is not superfluous because in addition to hastening death, its goal is “preserving the dignity of the procedure, especially where convulsions or seizures could be misperceived as signs of consciousness or distress.”<sup>33</sup>

Strongly objecting to the latter argument, Justice Stevens dissented:

Whatever minimal interest there may be in ensuring that a condemned inmate dies a dignified death, and that witnesses to the execution are not made uncomfortable by an incorrect belief (which could easily be corrected) that the inmate is in pain, is vastly outweighed by the risk that the inmate is actually experiencing excruciating pain that no one can detect.<sup>34</sup>

Distinguishing the Dutch uses of paralytics in euthanasia protocols, Stevens points out that whereas in the Netherlands physicians supervise medical euthanasia, no such supervision is available in executions due to the ethical prohibition that bans physicians and nurses from participating in the administration of the death penalty.<sup>35</sup>

Strikingly, the Court’s close examination of the constitutionality of the death penalty has prompted it to consider the use of similar methods in very different contexts of legally-sanctioned killing.<sup>36</sup> Beyond the immediate doctrinal analysis, the case brings to the foreground the striking convergence in the execution of patently different killings and, more importantly, a convergence in their underlying

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28. *Baze*, 553 U.S. at 58.

29. *Id.* at 72–73 (Stevens, J., concurring); *see also* *Workman v. Bredesen*, 486 F. 3d 896, 926 (6th Cir. 2007) (Cole, J., dissenting) (“Tennessee protects dogs and cats from the risk of excruciating pain in execution, but not death-row inmates.”).

30. *Baze*, 553 U.S. at 58; *id.* at 69 (Alito, J., concurring).

31. *Id.* at 58 (plurality opinion); *id.* at 69 (Alito, J., concurring).

32. *Id.* at 58 (plurality opinion).

33. *Id.* at 57.

34. *Id.* at 73 (Stevens, J., concurring) (footnote omitted).

35. *Id.* at 77 n.9.

36. *See id.* at 58 (plurality opinion).

ethical and epistemological foundations. To be sure, the Justices varied in the way they employed the analogies between executing inmates, euthanizing the terminally ill, and killing animals. Whereas the majority affirmed the comparison between Dutch euthanasia and American execution,<sup>37</sup> Justice Stevens drew attention to the treatment of animals in comparison to humans.<sup>38</sup> And yet, neither ignored the emergence of striking affinities between these very different contexts of taking life.

What sense can we make of this convergence? How deep does its logic go? Is it merely a trivial outcome of the choice of optimal means to achieve a desired end, or does it reach deeper into the foundations of our contemporary jurisprudence of death and dying? The following questions will guide our historical inquiry into these three deaths: First, since when has it become possible to consider the death penalty, euthanasia for the terminally ill, and animal killing within the same ethical and legal grid and to apply similar modes of execution to these radically different bodies? Second, how has it come about that in all three cases our laws and ethics separate the question of the legitimacy of *killing* from the legitimacy of *methods* of killing, shifting their focus from the former to the latter? What are the historical roots and cultural significance of other seemingly specific aspects of *Baze v. Rees*—such as the tension between the experience and the appearance of the body in pain?<sup>39</sup> And, finally, what are the broader stakes in the ethical and epistemological matrix of humane killing that emerged, as we shall see, in the latter part of the nineteenth century and continues to govern the field of lawful killings today?

## II. THREE BEGINNINGS

In 1881, Dr. Alfred Southwick came across the marvels of electricity when he saw an elderly drunkard touch the terminals of a live electrical generator.<sup>40</sup> The ease of death by electricity prompted the dentist and steamboat engineer to propose a new way of executing the death penalty.<sup>41</sup> He succeeded in convincing the governor of the state of New York that the science of the present day might supplant the cruel method of hanging with a more humane method.<sup>42</sup> In 1886, the New York state legislature resolved to appoint a commission to investigate and report to the legislature “the most humane and practical method of carrying into effect the sentence of death in capital cases.”<sup>43</sup> The new method favored by the

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37. *Id.*

38. *Id.* at 72 (Stevens, J., concurring).

39. *Id.* (plurality opinion).

40. Dawn Macready, Student Article, *The “Shocking” Truth About the Electric Chair: An Analysis of the Unconstitutionality of Electrocutation*, 26 OHIO N.U. L. REV. 781, 783 (2000).

41. See Arden G. Christen & Joan A. Christen, *Alfred P. Southwick, MDS, DDS: Dental Practitioner, Educator and Originator of Electrical Executions*, 48 J. HIST. DENTISTRY 117, 117 (2000).

42. See *id.*

43. *Glass v. Louisiana*, 471 U.S. 1080, 1082 (1985) (Brennan, J., dissenting) (internal citations omitted).

commission survived a century of medical and technological developments until it too was deemed inhumane and was gradually replaced in recent decades by the lethal injection as the preferred, and in some states exclusive, method of execution.<sup>44</sup>

Admittedly, efforts to reform the death penalty had begun long before the invention of the electric chair.<sup>45</sup> By the late eighteenth century, it was already clear that the infliction of pain was no longer the aim of the death penalty but only its necessary outcome.<sup>46</sup> Over the course of the nineteenth century hanging, too, went through a series of reforms. Different methods were explored to make hanging more expedient and less painful—including the introduction of a jerk-up mechanism in place of the fall-down, experimentation with longer drops, and the use of new triggers, including allowing the inmate to pull the lever himself.<sup>47</sup> And yet, as Banner notes:

Before the last third of the nineteenth century, accounts of bungled or obviously painful executions contain no indication that the spectators found them too troubling to bear. But that began to change. . . . There was nothing new about painful hangings; what *was* new was the shock that they produced in spectators.<sup>48</sup>

Dr. Southwick's reform opened the door for the pursuit of ever more humane methods of killing and a continuous questioning of the legitimacy of existing modes of taking life.<sup>49</sup> Ordinarily, new methods of killing came to replace older ones as a consequence of technical developments and growing objection among the public to existing methods.<sup>50</sup> Occasionally, as in the case of *Baze v. Rees*,<sup>51</sup> the legitimacy of a method made it to the courts. Three legal precedents are recorded in American history: an 1879 case concerning the firing squad,<sup>52</sup> an 1890 case concerning electrocution,<sup>53</sup> and a 1947 case of re-electrocution after the first attempt was botched.<sup>54</sup> In all three cases, the Court examined the legitimacy of the chosen method of execution, but did not question the legitimacy of execution

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44. Richard C. Dieter, *Methods of Execution and Their Effect on the Use of the Death Penalty in the United States*, 35 FORDHAM URB. L.J. 789, 798 (2008).

45. See, e.g., CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 102–17 (Voltaire trans., London, Printed for F. Newbery, 4th ed. 1775) (condemning the usage of the death penalty as more excessive than what is needed to deter).

46. STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 170–77 (2002).

47. *Id.* at 173.

48. *Id.* at 172–74.

49. See Christen & Christen, *supra* note 41, at 117.

50. ROBERT JOHNSON, DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS 40 (2d ed. 1998).

51. *Baze v. Rees*, 553 U.S. 35, 41 (2008) (plurality opinion).

52. *Wilkinson v. Utah*, 99 U.S. 130 (1878).

53. *In re Kemmler*, 136 U.S. 436 (1890).

54. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (plurality opinion).

itself. Ultimately, the Court found these methods constitutional,<sup>55</sup> but only because they conformed with prevailing norms of decency.<sup>56</sup>

Chairing the New York Commission on Capital Punishment was Elbridge T. Gerry, a prominent attorney and counsel for the Society for the Prevention of Cruelty to Animals.<sup>57</sup> The appointment of an animal protection activist to the committee was anything but surprising. At the turn of the twentieth century there was a close connection between the humane treatment of animals and of death row inmates, and activists of one cause would often be committed to the other. In 1891, Henry Salt, to take another example, founded the Humanitarian League, which opposed not only corporal and capital punishment but also inhumane methods of animal slaughter.<sup>58</sup> What animal protection activists and penal reformers shared in common was much more than a general sentiment of humaneness. It was a specific ethical concern with the methods of humane killing.

Admittedly, the first laws regulating animal protection were enacted already in the 1820s, but the major breakthrough took place in the 1860s with the establishment of the American Society for the Prevention of Cruelty to Animals (ASPCA), which was founded in 1866.<sup>59</sup> Two main issues were on the Society's agenda during the late nineteenth century and have been ever since—animal experimentation (vivisection) and the meat industry.<sup>60</sup> The latter concern played a major role in the slaughterhouse reform that took place in the second half of the nineteenth century.

In the early nineteenth century it was not self-evident that slaughterhouses, often located in residential areas, so that slaughtering could be done “at home,” were a nuisance, but by mid-century this was changing. A growing desire for hygienic, non-violent (that is, humane), and undetectable slaughter . . . The slaughtering that had, up until 1869, taken place “out in the open within the sight of the public including children,” was no longer to be witnessed . . .<sup>61</sup>

Regulation of the slaughterhouse included the introduction of new and more humane methods of slaughter. Animal activists called upon butchers and

55. *Francis*, 329 U.S. at 463; *Kemmler*, 136 U.S. at 449; *Wilkinson*, 99 U.S. at 135–36.

56. BANNER, *supra* note 46, at 40–43, 176–77; *see also* Kristopher A. Haines, *Lethally Injected: Evolving Standards of Decency in American Society*, 34 CAP. U. L. REV. 459, 461 (2005).

57. N.E. Brill, *Humanity in the Death Sentence*, 10 J. AM. MED. ASS'N 114, 114 (1888).

58. Ian MacLachlan, *Humanitarian Reform, Slaughter Technology, and Butcher Resistance in Nineteenth-Century Britain*, in MEAT, MODERNITY, AND THE RISE OF THE MODERN SLAUGHTERHOUSE 107, 110 (Paula Young Lee ed., 2008).

59. David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800s*, 1993 DETROIT C. L. REV. 1, 13 (1993). Interestingly, there is even one reported law dating back to seventeenth-century Puritans, but that was an exception. *See* Susan L. Goodkin, *The Evolution of Animal Rights*, 18 COLUM. HUM. RTS. L. REV. 259, 261 (1987).

60. *See* Favre & Tsang, *supra* note 59, at 14–18.

61. Lindgren Johnson, *To “Admit All Cattle Without Distinction”: Reconstructing Slaughter in the Slaughterhouse Cases and the New Orleans Crescent City Slaughterhouse*, in MEAT, MODERNITY, AND THE RISE OF THE SLAUGHTERHOUSE, *supra* note 58, at 198, 200, 206–07.

legislators to reexamine and improve existing methods.<sup>62</sup> Specifically, they deplored the traditional method of neck cut by a sharp knife as unnecessarily painful and of axing as inhumane.<sup>63</sup> Animal protection societies—in the United States, England, and Continental Europe—insisted that animals be stunned prior to their slaughter claiming that “our solemn moral and humanitarian duty commands that such killing be done as quickly and painlessly as possible.”<sup>64</sup>

Preslaughter stunning of livestock became a routine practice during the first few decades of the twentieth century in the United States.<sup>65</sup> Different methods of stunning were introduced including the use of a heavy bolt, electrocution, and gas.<sup>66</sup> The new techniques spread across Europe and the United States, being enforced at first by local regulations,<sup>67</sup> then gradually by national legislation in places like Switzerland (1893),<sup>68</sup> Britain (1933),<sup>69</sup> and Germany (1933).<sup>70</sup> By 1958 the U.S. Congress had also codified the stunning requirement in the Humane Methods of Slaughter Act (HMSA).<sup>71</sup>

The improvement of slaughter methods is continuously sought by animal protection societies and veterinarians. One of the unremitting points of public and legal contention concerns the ritual slaughter of animals by Jews and Muslims, whose laws prohibit the stunning of cattle prior to slaughter.<sup>72</sup> Jewish and Muslim slaughter has been prohibited in Switzerland and Scandinavia since the late nineteenth to early twentieth century<sup>73</sup> and continues to be debated across Europe and in the United States today.<sup>74</sup>

The legal regulation of animal euthanasia entered public discussion and regulation only in recent decades.<sup>75</sup> However, the regulation of euthanasia and the

62. There are several studies of this history. See, e.g., Dorothee Brantz, *Stunning Bodies: Animal Slaughter, Judaism, and the Meaning of Humanity in Imperial Germany*, 35 *CENT. EUR. HIST.* 167 (2002); Robin Judd, *The Politics of Beef: Animal Advocacy and the Kosher Butchering Debates in Germany*, 10 *JEWISH SOC. STUD.* 117 (2003); see also Shai Lavi, *Animal Laws and the Politics of Life: Slaughterhouse Regulation in Germany, 1870–1917*, 8 *THEORETICAL INQUIRIES L.* 221, 226 (2006) [hereinafter Lavi, *Animal Laws*]; Shai Lavi, *Unequal Rites: Jews, Muslims and the History of Ritual Slaughter in Germany*, 37 *TEL AVIVER JAHRBUCH FÜR DEUTSCHE GESCHICHTE* 164, 164–84 (2009).

63. MacLachlan, *supra* note 58, at 112.

64. NORTH GERMAN CONFEDERATION REICHSTAG, *STENOGRAPHISCHE BERICHTE ÜBER DIE VERHANDLUNGEN DES REICHSTAGES DES NORDDEUTSCHEN BUNDES*, 815 (1887) (Ger.).

65. The slaughter reform of the late nineteenth century is familiar to American constitutional scholars from the famous “Slaughter-House Cases.” *Slaughter-House Cases*, 83 U.S. 36 (1872).

66. MacLachlan, *supra* note 58, at 117.

67. See, for example, discussion of the German case in Brantz, *supra* note 62 at 187–88.

68. See Pablo Lerner & Alfredo Mordechai Rabello, *The Prohibition of Ritual Slaughtering (Kosher Shechita and Halal) and Freedom of Religion of Minorities*, 22 *J. L. & RELIGION* 1, 14–15 (2006).

69. MacLachlan, *supra* note 58, at 126.

70. Lavi, *Animal Laws*, *supra* note 62, at 227.

71. Constantinos Hotis, *The Anthropological Machine at the Abattoir: The Humane Methods of Slaughter Act*, 2006 *U. CHI. LEGAL F.* 503, 503.

72. Jeff Welty, *Humane Slaughter Laws*, 70 *LAW & CONTEMP. PROBS.* 175, 177–78 (2007).

73. Brantz, *supra* note 62, at 168 n.3, 192.

74. See RICHARD POTZ ET AL., *SCHÄCHTEN: RELIGIONSFREIHEIT UND TIERSCHUTZ* (2001) (Ger.).

75. Larry Carbone, *Euthanasia*, in 1 *ENCYCLOPEDIA FOR ANIMAL RIGHTS AND ANIMAL*

treatment of the dying patient, as we shall now see, date back to the late nineteenth century and conform to a similar logic of guaranteeing an ever more humane experience of dying.<sup>76</sup>

Several years before Dr. Southwick led his campaign to reform the method of execution, Samuel D. Williams, an otherwise unknown English businessman, published the first modern proposal for medical euthanasia.<sup>77</sup> Impressed by the recent discovery of chloroform and its use during surgery, the author proposed a solution to the problem of dying patients suffering from unbearable pain.<sup>78</sup> He wrote:

[I]n all cases of hopeless and painful illness, it should be the recognized duty of the medical attendant, whenever so desired by the patient, to administer chloroform, or such other anaesthetic as may by-and-by supersede chloroform—so as to destroy consciousness at once and put the sufferer to a quick and painless death. . . .<sup>79</sup>

Williams was the first to advocate the medical hastening of death as a public policy in the Anglo-American world.<sup>80</sup> At the time, euthanasia was fiercely opposed by both the medical establishment and the general public, and only a few leading American physicians were willing to openly endorse Williams' proposal.<sup>81</sup> By 1906, legislators in Ohio and Iowa were already drafting early bills legalizing euthanasia.<sup>82</sup> Although these attempts were soon defeated,<sup>83</sup> they marked a demand for a new way of dying that would persist into the twenty-first century. Williams foresaw that his initial proposal of chloroform would be gradually adjusted to meet developments in the administration of death.<sup>84</sup> Indeed, today in the states of Oregon, Washington, and Montana physicians can legally prescribe a drinkable solution of barbitol for hastening death,<sup>85</sup> and in the Netherlands, hopelessly suffering patients have the right to a lethal injection.<sup>86</sup> While the United

WELFARE 224, 225 (Mark Beckoff ed., 2d ed. 2010) (“The American Veterinary Medical Association first published guidelines for animal euthanasia in 1963 and has updated them six times, most recently in 2007.”).

76. For detailed studies of the history of euthanasia, see IAN DOWBIGGIN, *A MERCIFUL END: THE EUTHANASIA MOVEMENT IN MODERN AMERICA* (2003); N.D.A. KEMP, ‘MERCIFUL RELEASE’: THE HISTORY OF THE BRITISH EUTHANASIA MOVEMENT (2002); SHAI LAVI, *THE MODERN ART OF DYING: A HISTORY OF EUTHANASIA IN THE UNITED STATES* (2005).

77. See Charles B. Williams, *Euthanasia*, 70 *MED. & SURGICAL REP.* 909 (1894).

78. *Id.* at 911.

79. *Id.*

80. LAVI, *supra* note 76, at 41.

81. *Id.* at 42.

82. Jacob M. Appel, *A Duty to Kill? A Duty to Die? Rethinking the Euthanasia Controversy of 1906*, 78 *BULL. HIST. MED.* 610, 610 (2004).

83. *The Right to Die*, 2 *BRIT. MED. J.* 1215, 1216 (1911).

84. Williams, *supra* note 77, at 911.

85. Oregon and Washington have passed a “Death with Dignity Act” whereas the decriminalization of physician-assisted suicide in Montana is based on a court decision. See Nickolas C. Murnion & Rita L. Marker, *Brief Amicus Curiae in Robert Baxter versus State of Montana*, 25 *ISSUES L. & MED.* 33, 33–34 (2009).

86. Jackson Pickett, *Can Legalization Improve End-of-Life Care? An Empirical Analysis of the Results*

States Supreme Court has refused to recognize a constitutional right to physician-assisted suicide,<sup>87</sup> the struggle of dying patients to be allowed a more humane death continues, and the legal debate concerning the right to a painless death is far from being resolved.<sup>88</sup>

What all three cases share most prominently is the anxiety associated with a painful death. A new sensitivity to the pain that accompanies dying, which developed no later than the early 1800s, was gradually translated into social reform. The question facing policymakers, legislators, and courts was not simply whether a specific form of killing was intentionally cruel, but concerned the infliction of unnecessary pain—is the current way of dying acceptable, once another way of ending life has been made available? Can hanging be tolerated, once the electric chair has been conceived? Is a painful death constitutional, once anesthesia has been discovered? Should animals continue to suffer unnecessary pain, if they can be electrically stunned or, even more simply, shot in the head?

But beneath this benign notion of humanism and a utilitarian calculus of minimizing pain lies a deeper transformation in the understanding of the relationship between dying and pain. Three aspects of this transformation seem especially striking. The first is the dissociation of pain and death, which allows both advocates and opponents of current practices to question pain, while setting aside the act of killing itself as a separate question, one the courts are likely to treat with much less reproach. The second is the wish to not only minimize pain but eliminate it. And the third is a concern not only with the experience of dying but also with its appearance. All three aspects, as we shall see, emerged in the late nineteenth century and continue to characterize the legal regulation of these three deaths today.

#### *A. Separating Pain from Death*

The convergence of the three deaths cannot be explained merely as a humane concern with the minimization of pain. For such a concern to emerge, a prior and more radical transformation took place, not only of the ethics but also of the ontology and aesthetics of humane killing. The most significant change was the separation of pain from dying. The ontological possibility of a painless death was a necessary precondition for the ethical demand for it. Furthermore, the ethical separation of pain from death means that pain can make the taking of life legally questionable, while killing itself is set aside as a separate question and often goes unquestioned. Death is taken for granted, whereas dying is closely scrutinized. To be sure, opponents of the death penalty and animal slaughter are

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*of the Legalization of Euthanasia and Physician-Assisted Suicide in the Netherlands and Oregon*, 16 ELDER L.J. 333, 333 (2008).

87. Annette E. Clark, *The Right to Die: The Broken Road from Quinlan to Schiavo*, 37 LOY. U. CHI. L.J. 385, 397–98 (2006).

88. The heated controversy in the Schiavo case is one of the more recent reminders. See, e.g., Rebecca Dresser, *Schiavo and Contemporary Myths About Dying*, 61 U. MIAMI L. REV. 821 (2007).

often concerned with a broader array of issues than minimizing pain and readily endorse more radical alternatives, from abolitionism to vegetarianism, but these alternatives fall outside the law's purview. The law erects an acoustic partition between the moans of the dying and the silence of the dead, attending to the former, while turning a deaf ear to the latter.

Up to the nineteenth century, in all three acts of killing, death was indistinguishable from pain and suffering, though in each case the connection carried a different rationale. In the case of the death penalty, pain was not merely a tolerable by-product of the taking of life but precisely what punishment (Latin, *poena*) was about.<sup>89</sup> For justice to be done, the pain and suffering of the transgressor had to be sensed and seen.<sup>90</sup> In natural death, giving up the ghost gave rise almost inevitably to the pangs of death, as the soul refused to be torn away from the body. More generally, within Christendom, the pain of dying was conceived as either punishment for sin, a test of the perseverance of faith, or simply another sign of the corrupted world and the mortality of Man.<sup>91</sup> And finally, in the case of animal slaughter, Man's dominion over the animal gave humans both the right to take their life and the privilege to make little of their pain. Whether a desired outcome, a necessary by-product, or an admissible sacrifice, the point is not simply that causing pain was justifiable, but that it was viewed as inseparably connected to the taking of life.

By the nineteenth century, none of the above could be taken for granted any longer. The separation of death from pain—that is, the separation of death from the process of dying—allowed legislators and courts to concentrate on the regulation of the pain of dying, while setting aside the fact of killing and death. Dying became a distinct and highly questionable process, whereas death, or the taking of life, became an entirely separate ethical question and quite often an unquestionable legal norm.

This development is most apparent in the case of animal slaughter. Whereas taking the life of livestock is not questioned under modern Western law, ever more detailed attention is being devoted to the methods of slaughter in order to assure their humaneness and the minimal affliction of pain in the process. A similar development has taken place with respect to the death penalty. Positive law takes for granted the constitutional legitimacy of the death penalty, but even the most vocal advocates of the constitutionality of the death penalty do not question the constitutional constraints on the infliction of pain.

Things are a bit more complicated in the case of the deathbed, but a close historical analysis may reveal that here, too, a separation of death from the pain of dying has occurred. Unlike the death penalty and animal slaughter, taking the life of the dying patient as a public policy was hardly thinkable before the nineteenth

89. Joel Meyer, *Reflections on Some Theories of Punishment*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 595, 595–97 (1968).

90. *Id.*

91. *Romans* 6:23.

century. The common law deemed euthanasia murder, and assisted suicide—assisted murder.<sup>92</sup> Under the law, suicide was a heinous crime, a *felon de se*, and English law punished not only inchoate attempts but also actual suicides.<sup>93</sup> The King's Treasury confiscated the property of the deceased, and desecrated the body by burying it at a crossroads.<sup>94</sup> Today, however, the legitimacy of euthanasia is no longer fundamentally questioned. The common legal debate in the United States concerns the constitutional right to die and not a constitutional prohibition on killing. In other words, whereas the prohibition of the taking of life is not constitutionally protected, suffering pain at the deathbed has become a constitutional concern.<sup>95</sup>

Indeed, while the legitimacy of euthanasia is hotly debated, what is not debated is the right not to suffer pain even at the price of hastening death. Justice O'Connor referred to this unchallenged legal standard:

[T]here is no need to address the question whether suffering patients have a constitutionally cognizable interest in obtaining relief from the suffering that they may experience in the last days of their lives. There is no dispute that dying patients . . . can obtain palliative care, even when doing so would hasten their death.<sup>96</sup>

### B. Intolerable Pain

There is a further perplexing characteristic of the humanization of dying, which cannot be explained simply as a wish to minimize pain. In all three deaths, laws demand not merely that pain be reduced but rather pronounce a more radical ban on suffering. Pain and suffering are measured in seconds and detected in the least expected places. Often, even a minor quantum of pain may face fierce legal objection. Low degrees of pain and suffering, which would otherwise raise hardly any legal concern, become intolerable when experienced in the face of death. Why is it that the taking of life magnifies even the minutest suffering?

A case in point is the Florida Constitutional Court ruling in the expected execution of Thomas Harrison Provenzano.<sup>97</sup> The petitioner challenged the constitutionality of the electric chair, arguing that its use results in a prolonged death and creates a risk of pain.<sup>98</sup> The court heard testimony from over a dozen state officials, who had witnessed past executions and testified on a variety of

92. Kam C. Wong, *Whose Life Is It Anyway?*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 223, 244 n.37 (2006).

93. Stacy L. Mojica & Dan S. Murrell, *The Right to Choose—When Should Death Be in the Individual's Hands?*, 12 WHITTIER L. REV. 471, 472 (1991).

94. *Id.* at 473.

95. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

96. *Id.* at 737–38 (O'Connor, J., concurring).

97. Order Regarding Petitioner's "Amended Petition for Writ of Habeas Corpus and Petition to Invoke This Court's All Writs Jurisdiction and Petition for Extra Ordinary Relief," *Florida v. Provenzano*, (Fla. 1999) (No. CR84-835), available at <http://www.dc.state.fl.us/oth/deathrow/drorder.html>.

98. *Id.*

issues, but focused on the mouth and chin straps that were used to secure the inmate's head to the electric chair.<sup>99</sup> As expected, the court found death by electrocution constitutional.<sup>100</sup> Its only reservation concerned the use of the straps, which according to the court, were at times too tightly bound and caused unnecessary suffering.<sup>101</sup> The court concluded that the use of a mouth strap "may be desirable, however a smaller and/or redesigned mouth strap could accomplish the same purpose without raising the same issue involved here."<sup>102</sup>

A similar pattern emerges in the two other cases. In the case of animal slaughter, animal welfare advocates claim that traditional-religious practices are inhumane.<sup>103</sup> Numerous studies have tried to establish the precise degree and duration of suffering,<sup>104</sup> and for over a century leading veterinarians have debated whether traditional forms of slaughter prolong the death pangs.<sup>105</sup> Tellingly, the difference between the opposing parties is measured in seconds. Other critics of ritual slaughter focus on the preparatory phase; with striking similarity to the death penalty cases, they pay close attention to the strapping of the animal. The following is a typical argument in this context: "While the old-fashioned Weinberg pen has been documented as inducing stress levels almost 300% higher than levels resulting from the use of an upright pen, the Facomia pen used by Agri Processors is said to cause less stress."<sup>106</sup>

### *C. Dying and the Phantom of Pain*

A third and final characteristic of the ethics of the secular concerns the relationship between the experience of pain and its appearance. Here a further difference between the Benthamite calculus of pain and the ethics of the secular emerges: the centrality of aesthetics to ethics. If the taking of life is to be properly practiced, the absence of pain should be seen as much as experienced. The ethical challenge then becomes to bridge the gap between the appearance of pain and the alleged painlessness of death.

One possible way of bridging this gap, discussed earlier, was to introduce

99. *Provenzano v. Moore*, 744 So. 2d 413, 422 (Fla. 1999).

100. *Id.* at 414.

101. *Id.* at 433.

102. *Id.* at 413.

103. Melissa Lewis, *The Regulation for Kosher Slaughter in the United States: How to Supplement Religious Law so as to Ensure the Humane Treatment of Animals*, 16 ANIMAL L. 259, 263 (2010).

104. E.g., TEMPLE GRANDIN & JOE M. REGENSTEIN, MEAT FOCUS INT'L, RELIGIOUS SLAUGHTER AND ANIMAL WELFARE: A DISCUSSION FOR MEAT SCIENTISTS (1994), available at [http://digitool.library.colostate.edu//exlibris/dtl/d3\\_1/apache\\_media/L2V4bGlicmlzL2R0bC9kM18xL2FwYWNoZV9tZWVpYS8xNjM0Ng==.pdf](http://digitool.library.colostate.edu//exlibris/dtl/d3_1/apache_media/L2V4bGlicmlzL2R0bC9kM18xL2FwYWNoZV9tZWVpYS8xNjM0Ng==.pdf); see also SHECHITA UK, A GUIDE TO SHECHITA 11 (H. Kesselman et al. eds., 2009), available at [http://www.shechitauk.org/fileadmin/user\\_upload/pdf/A\\_Guide\\_to\\_Shechita\\_2009\\_.pdf](http://www.shechitauk.org/fileadmin/user_upload/pdf/A_Guide_to_Shechita_2009_.pdf).

105. See, e.g., J.A. DEMBO, THE JEWISH METHOD OF SLAUGHTER COMPARED WITH OTHER METHODS: FROM THE HUMANITARIAN, HYGIENIC, AND ECONOMIC POINTS OF VIEW (London, Kegan Paul, Trench, Trübner & Co. 1894).

106. Lewis, *supra* note 103, at 268 (footnote omitted).

new methods of taking life that would not only cause less suffering but would also appear less abhorrent. A different solution was to argue that the dying only seemed to be experiencing pain, but actually, the spectacle of the tortured body did not correspond to any real experience of pain. What used to be an inseparable experience of dying in pain became the separable experience of a painless death accompanied by a seemingly horrifying but ultimately benign “phantom of pain.”

The question of apparent pain and suffering has been a recurrent theme in cases discussing the constitutionality of the electric chair. Early on, it seemed as if electrocution would bridge the gap between the painlessness of death and a calm appearance of death. The point was made in the first constitutional review of the death penalty in the late nineteenth century,

[W]e think that the evidence is clearly in favor of the conclusion that it is within easy reach of electrical science at this day to so generate and apply to the person of the convict a current of electricity of such known and sufficient force as certainly to produce instantaneous, and therefore painless, death.<sup>107</sup>

Evidence that began piling up before the courts complicated matters, showing that the high voltage effectually burns the prisoner and is accompanied by extreme convulsions of the body, which may indicate the experience of extraordinary pain.<sup>108</sup> Many states eventually adopted alternative modes of execution, but advocates of the electric chair continued to insist that the high voltage produces instant unconsciousness, preventing any experience of pain.<sup>109</sup> However, a dissenting opinion of the Supreme Court of Nebraska endorses the practice of electrocution:

The State’s contention that electrocution does not subject prisoners to unnecessary pain . . . the electric current would cause instantaneous and irreversible electroporation of brain neurons or thermal heating of neurons would reach the point of causing cell death within 4 to 5 seconds. If correct, either theory would mean instantaneous or near-instantaneous loss of brain function and consciousness.<sup>110</sup>

The introduction of the lethal injection was supposed to solve the problem. The choice of a three-stage rather than a two-stage method had the sole aim of eliminating the appearance of the body in pain. The U.S. Court of Appeals for the Sixth Circuit’s decision clearly states the logic behind the procedure:

As the State explained, however, a two-drug protocol would lead to convulsions, a phenomenon the State understandably wished to avoid out of respect for the dignity of the individual and presumably out of respect for anyone, including the inmate’s family, watching the execution. (Lethal

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107. *In re Kemmler*, 136 U.S. 436, 443 (1890) (quoting *People ex rel. Kemmler v. Durston*, 7 N.Y.S. 813, 818 (N.Y. Gen. Term 1889)).

108. Philip R. Nugent, *Pulling the Plug on the Electric Chair: The Unconstitutionality of Electrocution*, 2 WM. & MARY BILL RTS. J. 185, 197 (1993).

109. *Id.*

110. *State v. Mata*, 745 N.W.2d 229, 273 (Neb. 2008).

injection without pancuronium bromide “would typically result in involuntary movement which might be misinterpreted as a seizure or an indication of consciousness.”<sup>111</sup>

Paradoxically, as we have seen, this solution gave rise to new concerns. Any attempt to artificially suppress the appearance of the body in pain may, at least in theory, lead to the horrifying result of a suffering which cannot be detected. The attempt to overcome the gap between a painless reality and a horrifying spectacle may lead to an opposite gap between a tranquil appearance and a painful experience.

A similar argument was made in the scientific literature with respect to the terminally ill patient. Physicians of the late nineteenth century who opposed euthanasia claimed that dying was in fact a natural experience, common perceptions of the deathbed notwithstanding. Though the body seemed to be in pain, in fact there was no experience of suffering. The argument was quite simple, even if grounding it required sophisticated scientific evidence. To make this point, the physicians and physiologists of the time developed a new semiology of the body, based on a hermeneutics of suspicion. An eminent physician of the late nineteenth century wrote:

[C]onvulsions, which so often attend the process of dying, are accepted in evidence of suffering, when in fact they are the reverse, for they imply a loss of consciousness and sensibility, and therefore, of the capacity to feel pain. They are automatic, and in all essential respects like the convulsions of epilepsy, of which the subject is wholly unconscious.<sup>112</sup>

Similarly, the groaning that accompanies the convulsions—that is, the voice of the dying patient—was also discarded as proof of pain, for the same groans accompany “the influence of ethereal vapor.”<sup>113</sup>

While proponents of new methods of killing were using scientific and technological advancements to prove the cruelty of old methods and to develop new methods that would minimize the suffering of pain, supporters of the old and traditional practices also turned to science, but to prove their humaneness.<sup>114</sup>

Advocates of ritual animal slaughter made similar arguments to protect Jewish and Muslim slaughter. Isaac Dembo, a leading veterinarian of the nineteenth century, launched a comparative and comprehensive study of animal slaughter across Europe.<sup>115</sup> His research, which was published in 1894, was highly influential and soon translated into English. Dembo claimed that “[t]he attempt to

111. *Workman v. Bredesen*, 486 F.3d 896, 909 (6th Cir. 2007) (citations omitted).

112. WILLIAM MUNK, *EUTHANASIA: OR MEDICAL TREATMENT IN AID OF AN EASY DEATH* 20 (BiblioBazaar 2010) (1887).

113. W.C. Dendey, *On the Physiology of Death and the Treatment of the Dying*, 1 J. PSYCHOL. MED. & MENTAL PATHOLOGY 112, 119 (1848).

114. Senator Hubert H. Humphrey voiced a similar position during congressional discussions of the new slaughter bill. 104 CONG. REC. 15,373 (1958); *see also* *Jones v. Butz*, 374 F. Supp. 1284, 1291 n.10 (S.D.N.Y. 1974).

115. *See* DEMBO, *supra* note 105, at 103–11.

prove that consciousness is retained by instancing the fact that sometimes epileptoid convulsions follow the act of slaughter does not seem to me at all (more) reasonable . . . to the animal that is already deeply unconscious, it matters nothing whether its muscles are convulsed or at rest . . .”<sup>116</sup>

And similarly, nearly a century before opponents of the death penalty concerned themselves with the use of paralytics, turn of the twentieth-century animal protection activists were mindful of the use of drugs, such as curare, which may conceal the reality of animal suffering. As one physician noted, “The drug [curare] is never used as an anesthetic except when it is necessary to anesthetize the public conscience.”<sup>117</sup>

To conclude, one way of separating the body in pain from the dying body was by reducing the suffering involved in death. Another solution was to deny the reality of suffering as mere appearance, by introducing a split between the real pain suffered by the living and the phantom of pain, which, although it may be highly disconcerting to the surrounding people, remains unknown to the dead corpse.

### III. HUMANE KILLING BEYOND THE DISENCHANTMENT/ENCHANTMENT DIVIDE

The convergence of the death penalty, medical euthanasia, and animal slaughter is a riddle that should not be resolved too hastily. Two solutions readily offer themselves. Each, as will become clear, represents a different understanding of the relationship between humane killing and the modern age. The first is a theory of secularization, along Weberian lines, which emphasizes processes of rationalization and disenchantment. The second, its mirror image, is a theory of re-enchantment, which follows in the footsteps of Girard’s accounts of mimetic violence and political theology. Each account illuminates certain aspects of the phenomenon, but neither offers an exhaustive account of the whole. The tension between the disenchantment and enchantment accounts of the dying process is logically irreconcilable and raises the question as to what precisely is the relationship between the two explanations and whether and how they shed light on humane killing.

#### *A. Secularization and Disenchantment*

The first account is grounded in the Weberian thesis of secularization. This account is most readily applicable to the deathbed of the dying patient. In fact, Weber himself contemplated the question regarding the crisis of dying in the modern world.<sup>118</sup> Discussing Tolstoy’s Ivan Ilych,<sup>119</sup> he writes: “All [Tolstoy’s]

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116. *Id.* at 11.

117. Alper, *supra* note 16, at 822 (quoting EDWARD BERDOE, A CATECHISM OF VIVISECTION: THE WHOLE CONTROVERSY ARGUED IN ALL ITS DETAILS 70 (1903)).

118. MAX WEBER, *Science as a Vocation*, in ON CHARISMA AND INSTITUTION BUILDING 294, 297–99 (S.N. Eisenstadt ed., 1968).

broodings increasingly revolved around the problem of whether or not death is a meaningful phenomenon. And his answer was: for civilized man death has no meaning."<sup>120</sup>

Indeed, dying, once a transitional moment from this world to the world to come, gradually became a this-worldly event.<sup>121</sup> First, in the sixteenth century, extreme unction, the rite of the deathbed, was replaced by the Protestant *ars moriendi* that demanded self-reflection and an inner religious experience of transformation.<sup>122</sup> Second, in the nineteenth century, the medicalization of death took place, along with a changing of the guard between the confessional priest and the medical doctor.<sup>123</sup> Dying and its associated pain and suffering lost their meaning and could no longer constitute either a meaningful personal experience or a communal spectacle.<sup>124</sup> Pain was overcome by the use of anesthetics,<sup>125</sup> and dying was circumvented either by an attempt to prolong life indefinitely or, by the flip side of the same coin, the deliberate desire to hasten death.

In a similar way and still within the Weberian framework, we can understand the transformations of the death penalty, which in premodern societies had clear religious undertones. The execution inscribed the torments of the soul on the tormented body. The public execution, including the expectation of a public confession, took place in the name of both the earthly and heavenly sovereign.<sup>126</sup> Once, no later than the nineteenth century, when the death penalty was no longer viewed as divine punishment enacted by human hands, there could be little justification for or sense to the affliction of what became viewed as "unnecessary" pain. Finally, the slaughter of animals, too, had its origins in a religious cosmology in which humans were higher on the *scala naturae* than animals,<sup>127</sup> which were placed under their dominion only because this was the will of their common Creator. The killing of animals was now justified as serving bare human needs, but only to the extent the taking of life, which required no special justification, could be divorced from the process of dying, which underwent close scrutiny.

The pain of dying no longer had a place in a rationalized and disenchanting world. Pain could only be justified if it served a purpose, and hardly any purpose could be served by the suffering of a person who will soon perish. The suffering of the dying could not be justified as part of a process of recovery, nor could the suffering of the death-row inmate be justified as part of a process of repentance

119. TOLSTOY, IVAN ILYICH, *supra* note 1.

120. WEBER, *supra* note 118, at 298.

121. See LAVI, *supra* note 76, at 57–61.

122. On the *ars moriendi* tradition, see DAVID WILLIAM ATKINSON, *THE ENGLISH ARS MORIENDI*, at xiii–xxv (Eckhard Bernstein ed., 1992).

123. See LAVI, *supra* note 76, at 44–54.

124. IVAN ILICH, *MEDICAL NEMESIS: THE EXPROPRIATION OF HEALTH* 10 (1976).

125. See MARTIN S. PERNICK, *A CALCULUS OF SUFFERING: PAIN, PROFESSIONALISM, AND ANESTHESIA IN NINETEENTH-CENTURY AMERICA* 236 (1985).

126. On secularization of the death penalty, see GARLAND, *supra* note 7, 53–54.

127. Kyle Ash, *Why "Managing" Biodiversity Will Fail: An Alternative Approach to Sustainable Exploitation for International Law*, 13 *ANIMAL L.* 209, 231 (2007).

and atonement. As for retribution, death itself served this role and any additional unnecessary suffering would be vengeful. Similarly, the taking of life of an animal might be a human necessity, but to cause it additional pain in the process, cannot be anything but a mark of human cruelty. As long as dying and death were closely intertwined, pain could be understood and justified as part of a corrupted world—a necessary outcome of the departure of the soul from the body, an atonement of the condemned, and a privilege that humanity had over the animal kingdom—but with the separation of death from dying, the pain of the dying became intolerable.

The pain of the dying could no longer be justified nor could it be comprehended. This led scientists to question its very existence. Physicians, physiologists, and veterinarians wondered whether pain in dying was a mere appearance, a combination of a body that lost its vitality and could no longer experience pain, but merely undergo convulsion. Dying was no longer a dramatic moment in which the soul was torn away from the body, but merely a moment of depletion, not a transition to a world to come, but a passage into nothingness.

Convincing and coherent as this framework of analysis may sound, it is hard to accept the disenchantment thesis on face value. In the final analysis, it tells a story that is hard to believe: on how we moderns have ridden ourselves from the residues of older metaphysics and replaced it with the cold processes of rationalization and demystification and failed to account for the exceptional nature of these acts of killing. One is left with the suspicion that rather than an enlightened overcoming the sacred and enchanted, the very idea of a humane killing calls to life the all but dead specters of the sacred.

### *B. Enchantment and the Sacred*

Disenchantment and rationalization processes offer a plausible framework for unraveling part of the puzzle of humane killing. But some aspects of the phenomenon remain unresolved. The meticulous concern with the suffering of the dying seems to exceed the rational imperative to reduce unnecessary pain. This heightened sensitivity is not easily reconcilable with what appears to be a legal indifference to the act of killing itself. Furthermore, the insistence that dying not only be painless, but also appear to be painless, suggests that humane killing is carried out as a public spectacle as much as an ethical commitment, and that it seeks to appease public emotions as much as to assuage public reason.

These exceptional elements of humane killing suggest that rather than a secular ethics of dying, we are facing a sacred ritual of taking life. Contra Weber, it is not that dying has been separated from death and has become an independent focus of moral concern, but rather that a new way of taking life has developed, one very different from its historical antecedents but by no means less meaningful or less ritualized. Under this account, the concern with the pain of dying does not imply that death is taken for granted, but rather that the painlessness of death is precisely what lends this form of killing its meaning and legitimacy. Similarly, the spectacle of a painless death and the serene body do not suggest that pain has lost

its meaning and its enchanting power. The silence of the body—far from muteness—speaks in its own dialect of the sacredness of the act of killing.

This alternative interpretation of humane killing takes its cue from René Girard's insight regarding the relationship between violence, law, and the sacred.<sup>128</sup> If modernity for Weber is about the demise of the sacred, for Girard the sacred continues to govern modern societies, albeit in less conspicuous forms.<sup>129</sup> For Girard, violent acts of taking life such as the execution of the criminal and the slaughter of the animal are best understood as scared acts of killing, for the sacred is nothing other than an encounter with the ultimate, which in contemporary societies takes the form of the modern state.<sup>130</sup>

In nonmodern societies, according to Girard, these sacred acts of killing take the form of sacrifice. What is distinct and puzzling about sacrifice is that the violence of the law is directed against the innocent rather than the guilty. This is apparent in ancient traditions and myths in the sacrifice of animals for divine and human consumption and in the sacrifice of the young and innocent to appease the gods. Girard's explanation of the logic of sacrifice is revealing. Violence, he claims, constantly threatens to spiral out of control leading to endless cycles of devastation.<sup>131</sup> Any attempt to entirely rid society from violence is bound to fail. The challenge is to contain violence and limit its destructive effects by directing violence outside of society and channeling it to the vulnerable and innocent parties on the margins of society.<sup>132</sup> The taking of life remains an encounter with "the ultimate," but rather than God, it is now the state that has taken the place of the deity, containing violence by an act of sacred killing that prevents it from spreading and thus guards a peaceful order. Similarly and following Girard, one may view the death penalty, euthanasia, and the slaughter of the animal as sacred acts of killing. They are socially sanctioned executions, ultimate acts of taking life that are meant to quiet social unease, much as ancient sacrifice sought to appease the gods.

True, the three forms of humane killing do not involve pain nor the spilling of blood that historically lent these deaths their ritual character. Indeed, at first there may seem to be little in common between the violent sacrifice of the innocent and the humane killing of the animal, the death row inmate, or the dying patient. Girard would readily concede that today the lawful taking of life no longer has the form of sacrifice. Rather than a passionate outburst of religious violence, today one faces the pacified mechanisms of the judicial system. It is not the innocent who is sacrificed, but the guilty; or, as in the case of the dying patient, life

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128. RENÉ GIRARD, *VIOLENCE AND THE SACRED* 326 (Patrick Gregory trans., 2005). A similar line of argument has been taken up more recently in COLIN DAYAN, *LAW IS A WHITE DOG: HOW LEGAL RITUALS MAKE AND UNMAKE PERSONS* (2011).

129. GIRARD, *supra* note 128, at 326.

130. *Id.*

131. *Id.*

132. *Id.*

that does not deserve protection because it has lost its sacredness and dignity; or, as in the case of the brute animal, which is no longer recognized as part of divine creation, life which is denied such sacredness from the outset. But is the execution of the utterly helpless and disrobed less sacred than the sacrifice of the innocent? And does the absence of pain deny sacred power, or is it precisely the elimination of pain that reveals the sacred character of humane killing?

Quite on the contrary, Gerard argues. The taking of life by the all-powerful state, like ancient deities possessing ultimate power over life and death, is the modern reincarnation of sacred killing. Whereas the killing of the innocent was intended to channel violence outside of society and prevent the endless cycle of bloodshed, with the rise of the modern state and the monopoly of the judicial system over the legitimate use of violence, this threat no longer exists. The state can put an end to the cycle of violence precisely because it can kill without shedding blood. What distinguishes the death penalty from the scaffold, medical euthanasia from suicide, and the stunning of the animal in the modern abattoir from the traditional neck-cut is the pacified taking of life. As opposed to the criminal whose violence is always limited and is likely to meet the resistance of both the victim and the state, the state's killing manifests the sovereign's monopoly over violence, which meets no resistance. Consequently, whereas the scene of the crime is often a site of struggle, pain and the violent shedding of blood, state-sanctioned execution is pacified, bloodless, and painless. This is equally true with the necessary adjustments to the pacified and sterilized death of euthanasia and modern slaughter. The innocent victim of sacrifice has been replaced by the helpless victim of humane killing, whose silent killing announces the almighty power of the state.

One may find a further elaboration of a similar point in Giorgio Agamben's account of sacred killing.<sup>133</sup> Agamben's point of departure is the *homo sacer*, a marginal figure of Roman law, whose legal status is defined by the perplexing statement that he "may be killed and yet not sacrificed."<sup>134</sup> Agamben offers an elaborate interpretation of the *homo sacer* as a person whose existence has been reduced to bare life, namely, to mere biological existence.<sup>135</sup> In contradistinction to Girard, the power of the sovereign is not the monopoly over the use of legitimate violence, but rather the power to exclude a person from the protection of the law and declare him a *homo sacer*.<sup>136</sup> The sovereign power to ban is the power to disrobe life from its sacredness and to condemn life to mere biological existence, to a life that may be extinguished without sanction.

The accuracy of Agamben's historical account of Roman law has been

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133. GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (Daniel Heller-Roazen trans., 1995).

134. *Id.* at 8.

135. *Id.* at 3–4.

136. *Id.* at 5–6.

challenged and need not be resolved here.<sup>137</sup> More important and more relevant to our discussion are the contemporary examples that Agamben discusses as modern incarnations of the *homo sacer*. He refers in this context to the dying patient and to the animal, but his insights may equally pertain to death-row inmates. All three figures are excluded by law from the law and are denied legal protection. Humane killing from this perspective is the lawful killing of the outlawed. If, as a rule, law is what grants biological life sacred protection, in these exceptional cases law deems life to mere biological existence. These figures are banned to “a zone of indistinction” in which legal normativity is no longer distinguishable from mere biological facticity. Life is only protected as the bare life of a sentient being, and consequently, it is protected from pain and suffering but not from killing itself. The sovereign exercises in these acts of killing his ultimate power to reduce life to its mere biological existence. Humane killing under this account is not the least violent way of killing, but rather the killing that takes a very particular form of violence—a spectacle of painless violence. If indeed, as Girard and Agamben suggest, death purified from pain and blood is the modern insignia of sacred killing, then the modern world is much less disenchanting than Weber would have us think. In these practices, the sacred continues to thrive as a specter lurking behind what only appears to be a disenchanting death.

### C. *Toward an Anthropology of the Secular*

We have explored two seemingly contradictory accounts of humane killing, one placing the practice in the grand narrative of rationalization and disenchantment, and the other in the grand narrative of ritualization and re-enchantment. Are we called to choose between the two? Do the two exhaust the landscape of possible explanations, or should we seek alternative accounts? In this final section, I claim that the two frameworks share more in common than may seem, and that a proper understanding of their interrelationship opens an alternative path for understanding humane killing, which does not commit itself to the grand narratives of modernity.

This alternative offers a critical appraisal of the secularization thesis without falling prey to its diametric opposite, to the enchantment of the world, which assumes the same set of binary oppositions between enchantment and disenchantment only to side with the former rather than with the latter.

Rephrasing Talal Asad’s line of inquiry, the challenge before us is to accept the reality of the secular without accepting the secularist account of this reality. *Secularism* is here understood as the ideological, self-congratulatory account of the secular, which portrays secularization as a unified process and as an inevitable outcome of modernity, whereas the *secular* is an important but much less

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137. See, e.g., Puspa Damai, *The Killing Machine of Exception: Sovereignty, Law, and Play in Agamben’s State of Exception*, 5 *NEW CENTENNIAL REV.* 255, 255–76 (2005) (reviewing GIORGIO AGAMBEN, *STATE OF EXCEPTION* (Kevin Attell trans., 2005)).

comprehensive phenomenon, and thus markedly different from its Weberian and the Girardian account. Asad explains,

The secular, I argue, is neither continuous with the religious that supposedly preceded it (that is, it is not the latest phase of a sacred origin) nor a simple break from it (that is, not the opposite, an essence that excludes the sacred). I take the secular to be a concept that brings together certain behaviors, knowledges, and sensibilities in modern life . . . . It is a matter of showing how contingencies relate to changes in the grammar of concepts—that is, how the changes in concepts articulate changes in practices.<sup>138</sup>

Asad emphasizes the contingency of the secular. The secular does not produce a systematic, logically coherent pattern of practices. The proper study of the secular is as an anthropology, not as a philosophy. In our context, it would be a mistake to reduce humane killing to a “logic” of the secular, but it would be equally wrong to dub humane killing as “sacred” only because attempts at a systematic rationalization of the secular have failed.

Furthermore, Asad’s critique of secularism emphasizes the morally laden and ethically questionable presuppositions of secularization. This is an important insight, which brings us back to our initial point of departure. What first caught our attention about the convergence of the three deaths was not the metaphysics of disenchantment and enchantment, but rather, and most directly, the emergence of a new ethics—the ethics of “humane” killing. Thus, the place to resume our critical account is in a proper understanding of this highly peculiar practice of “humanization.”

From the viewpoint of secularist ideology, the “humanization of death” is a mark of ethical progress, one commonly identified with Norbert Elias’s famous civilizing process.<sup>139</sup> According to Elias, in a long and gradual historical progression, Europeans became ever more self-restrained in their approach to violence, sexual behavior, and bodily functions, and learned to sublimate strong drives and emotional impulses.<sup>140</sup> The civilizing process, which began in the medieval courts among the aristocratic elite, gradually trickled down and spread among the middle and lower classes.<sup>141</sup>

Elias himself demonstrated the implications of this thesis for the history of death and dying in his book *The Loneliness of Dying*. He writes:

Death is one of the great bio-social dangers in human life. Like other animal aspects, death, both as a process and as memory-image, is pushed more and more behind the scenes of social life during this civilizing spurt . . . . Never before in the history of humanity have the dying been

138. ASAD, *supra* note 10, at 79.

139. NOBERT ELIAS, *THE CIVILIZING PROCESS: SOCIOGENETIC AND PSYCHOGENETIC INVESTIGATIONS* (Eric Dunning et al. eds., Edmund Jephcott trans., rev. ed. 2000).

140. *Id.* at 117–19.

141. *Id.*

removed so hygienically behind the scenes of social life; never before have human corpses been expedited so odourlessly and with such technical perfection from the deathbed to the grave.<sup>142</sup>

For Elias, the humanization of death ties the ethical imperative together with sociopsychological sensitivities. It is a part of modern Western societies' attempt to eliminate the visceral dimension of dying and the violence of death—be it the death of humans or animals, the dying or the executed.<sup>143</sup>

A critique of the secularist account of morality begins by noting that the three cases of humane killing are by no means part of an all-encompassing grand narrative of Western secular ethics. Quite on the contrary, the practices of humane killing are highly circumscribed and narrowly defined. They are the exception and not the rule, as is evident once they are set against the background of broader institutional practices. Incarceration facilities, the hospital, and the slaughterhouse have become synonymous not with the reduction of pain and suffering, but rather as sites of their unnecessary infliction. These total institutions inhabit dire conditions of existence that dramatically diverge from the humane standards of taking life. Placing humane killing within its institutional context reveals an apparent tension between the resolution to overcome pain and suffering, which exists side-by-side with inhumane conditions that remain unchallenged and are often taken for granted.

This is not to deny a growing awareness to the living conditions behind the walls of these institutions, nor to ignore activist mobilization aimed at improving these conditions through legal means, including animal welfare laws, prisoner rights, and patient rights. But the very existence of these struggles suggests that in the final analysis these mundane forms of pain and suffering are tolerated and treated dramatically differently from the intolerable pain and suffering involved in humane killing. This disparity is highlighted when we view the nineteenth-century reforms, discussed above, from the vantage point of the twenty-first century. From the perspective of the present, the rise of humane killing in the late nineteenth century can no longer be seen, if ever it could, as a forward march toward a greater humanization of the treatment of the dying, the inmate, or the prisoner.

And yet, this disparity should not bring us back to charges of hypocrisy. Hypocrisy is a form of condemnation, not an explanation. Furthermore, charges of hypocrisy are grounded on the assumption that one may expect consistency in ethics, as if ethics was a logical system of propositions. But there is something quite different from hypocrisy that is taking place in human killing and a deeper understanding of Elias's contribution may help us see this.

142. NOBERT ELIAS, *THE LONELINESS OF DYING* 12, 23 (Edmung Jephcott trans., 1985).

143. A similar idea is echoed in Chief Justice Warren's famous assertion that the Eighth Amendment prohibition of "cruel and unusual punishment" should draw its meaning from "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958).

Elias's thesis has been read—and rightfully so—as yet another version of the secularization thesis, unfolding the march of humanity away from irrational emotions and toward the rational ordering of Western civilization.<sup>144</sup> But this is not the only possible interpretation of the civilizing process nor the most revealing one. This becomes evident once Elias's account is read as a history of etiquette rather than of ethics. Elias seems to say as much when he emphasizes that his interest lies not in the moral and ethical formation of individuals (akin to the German notion of *Bildung*) but rather in the outward change of attitudes and behaviors (captured by the French *civilisation*).<sup>145</sup> Carrying this line of thought one step further, and most likely beyond Elias's original intentions, the process he identified does not have an overall and indiscriminate scope and does not characterize Western modernity as such. Rather, he documents the emergence of certain patterns of sensitivity to suffering that give rise to a context-specific etiquette.

This may explain why it makes sense to discuss in one and the same breath, as part of one and the same civilizing process, the benign development of table manners along the much weightier process of the humanization of taking life. From an ethical point of view, placing these practices on the same axis may seem as a banalization of ethics, but once we begin thinking of these evolving traditions as etiquette rather than ethics, there is no room to be puzzled about the contingency of these patterns and their discrepancies.

Humane killing is a distinct modern etiquette, which applies only in specific contexts and is driven less by the logic of moral principles and more by the contingency of ethical sensibilities. It is a ritual not in any enchanted sense, but rather as an elaborate manual of practices of the body and on the body that have been singled out. What may explain humane killing, according to Asad, is not a study of secularism as a comprehensive philosophy, but as a contingent anthropology.<sup>146</sup>

But Asad's endorsement of contingency should not be taken to an extreme. Doing so might leave us at the end precisely where we had begun, baffled by the practices of humane killing. By way of conclusion we must consider the possibility that our long journey may have not been in vain after all, and that even if in the final analysis, neither disenchantment nor enchantment can be taken at face value, each holds a part of the truth.

Humane killing is neither a result of secularization process nor the result of enchantment. It is rather a practice that has been caught in between the old and the new. On the one hand, the old traditions of taking life have lost any sense of meaning to us moderns, and in that sense they do indeed belong to the secular. On the other hand, they are unique sites of secular etiquette and do not point to a

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144. See ELIAS, *supra* note 142, at 5–9.

145. *Id.* at 5–8.

146. ASAD, *supra* note 10, at 16.

higher morality any more than our table manners do. The reason why these practices receive such close scrutiny is not because they continue to be sacred rituals, but rather precisely because they have been sacred rituals and no longer are. In this sense they have become a mirror against which we moderns are busy examining ourselves, insisting on carefully fashioning our appearances and measuring ourselves against them. Doing so does not turn us into hypocrites, nor does it suggest that we are less morally committed than our predecessors, but nor does it make us morally more noble.

#### CONCLUSION

The articles collected in this Volume and in the one preceding it under the title “Law As . . .” have been summoned by a call to rethink law beyond the methodological and theoretical horizons of existing “Law *and* . . .” analysis, that is beyond the realism, historicism, and instrumentalism that have characterized major trends in twentieth-century American legal scholarship. Previous conceptions of “Law and . . .” have sought to expose the social, historical, and economic forces that coconstitute law and by this to disenchant law and “secularize” it. In contradistinction, “Law *as* . . .” opens the possibility for reexamining law beyond the secular, or—as suggested here—without taking the “secular” at face value.

The present contribution continues a move I began exploring in the previous volume of “Law As . . .” challenging the notion of the secular without retreating back into the world of the sacred. The crux of the argument is that secularism—the official ideology of the secular age—misconstrues both the secular and the religious by presenting the secular as the counterimage of religion, thus creating a false opposition between a modern disenchantment world and a traditional enchanted one. A critique of secularism begins with the understanding that both disenchantment and enchantment are modern concepts and the very juxtaposition of the two is a hallmark of the secular age. To be sure, the problem with contrasting religion and the secular is not the stereotypical and all too familiar representations of the secular as ever more humane and rational system of beliefs and practices than religion. This is merely the outcome of a much deeper confusion about the limitations of secularism. The problem lies deeper and emerges in much less expected contexts such as the understanding of action, subjectivity, pain, the animal, and ritual, which provide the building blocks of the secular world.

To critically revisit this familiar contraposition each of the two sides of the equation needs to be studied separately on its own terms. In the previous Essay, “Enchanting a Disenchanted Law: On Jewish Ritual and Secular History in Nineteenth-Century Germany,”<sup>147</sup> I explored one side of the story—namely, the

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147. Shai J. Lavi, *Enchanting a Disenchanted Law: On Jewish Ritual and Secular History in Nineteenth-Century Germany*, 1 U.C. IRVINE L. REV. 813 (2011).

way “religion” emerges in the nineteenth century as a category in which religious practice is identified as “ritual,” a category which developed during the Reformation and took on a new anthropological sense in the nineteenth century.

In the present Essay I have turned the critical gaze to the secular side of the equation in an attempt to understand a specific syntax of secular humanism. The way to study the secular without falling into the secularist religion/secular juxtaposition has been to turn the critical gaze away from cases in which religion and the secular prefigure explicitly to the study of humane ethics, in which the secular does not lay bare on the surface.